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In re Application of: Bryan Bergeron

Serial No.: 9/992,328

Filed: November 19, 2001

For: DRINKING CONTAINER

Group Art Unit: 3727

Examiner: Stephen J. Castellano

Brief on Appeal

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Commissioner for Patents
P.O. Box 1450
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Real Party In Interest

The party named in the caption of the brief, Bryan Bergeron, is the real party in interest.

Related Appeals and Interferences

Appellant knows of no other appeals or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

Status of Claims

Claims 1-10 are the subject of the appeal. Appellant's withdrawn claims, claims 11-17, have been withdrawn from consideration under 37 CFR 1.142(b) and are not the subject of this appeal.

Status of Amendments

In a September 3, 2003 response to the final office action, appellant requested an amendment of Claim 8 to provide an antecedent basis for the first mention of “outer surface” in order to place claim 8 in better form for appeal. Appellant also requested entry and review of new claims 18-22, which presented somewhat narrower versions of claims 3-7. In a September 12, 2003 advisory action, the Examiner declined to enter the proposed amendments.

Summary of Invention

The invention is a drinking container for assisting a disabled person in drinking a fluid by reducing the degree of tilt necessary to drain the fluid from the container into the person’s mouth. The invention differs from the prior art primarily in that it includes a fluid diverter member 4 and a flow channel 12 formed along the outer surface of the fluid diverter member 4.

Claim 1 is directed to a broad embodiment of the invention. Claim 1 includes a fluid holding vessel 2 having an upper rim 16 and a closed bottom 6, the upper rim having an opening through at least a sipping region 16A thereof, and a fluid diverter member 4 contiguous with an inner surface and the bottom of the vessel. As shown in Figures 1-4, the fluid diverter member 4 slopes downward substantially from the sipping region 16A of the rim 16 toward an opposing side of the vessel 2 such that when the bottom of the vessel is pivoted upward about the sipping region 16A of the rim 16, the fluid diverter member 4 compels fluid through the sipping region 16A. As will be discussed in further detail below, a detailed description of the fluid diverter member is provided at page 8, line 8 to page 9, line 2 of the original specification.

Independent claim 8 is directed to a narrower embodiment of the invention. As in claim 1, claim 8 includes a fluid holding vessel 2 having an open upper rim 16 and a closed bottom 6. Claim 8 further specifies that the fluid holding vessel has an extension spout 8 extending upward and outward from the upper rim 16, an upper portion of the extension spout forming a sipping region 16A. As in claim 1, claim 8 includes a fluid diverter member 4. Claim 8 further specifies that the fluid diverter member 4 is a wedge-shaped fluid diverter member 4 contiguous with an inner surface and the bottom of the vessel, the fluid diverter member 4 sloping downward from the sipping region 16A of the extension spout 8 toward an opposing side of the vessel 2 such that when the bottom of the vessel is pivoted upward about the sipping region 16A, the fluid diverter member 4 compels fluid through the sipping region. Claim 8 also includes a flow channel 12. The flow channel 12 extends lengthwise along the outer surface of the fluid diverter member 4, as shown in Figures 1C, 2B, and 3B. The flow channel 12 is positioned and configured to assist the fluid diverter member 4 in compelling fluid through the sipping region. As will be discussed in further detail below, a description of the flow channel 12 is provided at page 9, line 14 to page 10, line 5 of the original specification.

Claim 2 depends from claim 1 and further specifies that the fluid diverter member 4 is wedge shaped. Claim 3 depends from claim 1 and further specifies that the fluid diverter member 4 has a flow channel 12 extending lengthwise along an outer surface of the fluid diverter member 4, the flow channel 12 positioned and configured to assist the fluid diverter member 4 in compelling fluid through the sipping region 16A.

Claim 4 depends from claim 1 and further comprises a handle 18 on an outer surface of the vessel 2, the handle positioned at about ninety degrees relative to the sipping region 16A. Claim 9 adds the same handle limitation to independent claim 8.

Claim 5 depends from claim 1 and further comprises a pair of handles 22 on an outer surface of the vessel 2, one of the handles positioned at about 90 degrees relative to the sipping region, and the other of the handles positioned at about 270 degrees relative to the sipping region, as shown in Figures 2A and 2B. Claim 10 adds the same handle limitations to independent claim 8.

Claim 6 depends from claim 1, and further specifies that the sipping region 16A comprises an extension spout 8 extending upward and outward from the upper rim 16, the extension spout 8 contiguous with the fluid diverter member 4 to thereby assist the fluid diverter member 4 in compelling fluid through the sipping region 16A, as shown in Figures 1A and 1B.

Claim 7 depends from claim 1 and further comprises a lid 20 configured to removably seal the upper rim 16, the lid 20 having an extension spout 8 configured to extend the fluid diverter member 4 upward and outward to thereby assist the fluid diverter member 4 in compelling fluid through the sipping region 16A, as shown in Figures 4A and 4B.

Issues

Issue 1 – Whether the drawings show a flow channel 12 extending along an outer surface of the fluid diverter member 4.

Issue 2 – Whether Claims 3 and 8-10 contain structure that is not shown in the drawings.

Issue 3 – Whether Claims 3 and 8-10 contain subject matter that is not described in the specification.

Issue 4 – Whether Issues 1, 2 and 3 relate to petitionable or appealable subject matter.

Issue 5 – Whether Claims 1-10 are anticipated by Neville and Dixon.

Issue 6 – Whether Claims 1-6 and 8-10 are anticipated by Watson.

Issue 7 – Whether Claims 4, 5, 9 and 10 are obvious over Neville/Dixon in View of Rosen.

Grouping of Claims

For each ground of rejection which appellant contests herein which applies to more than one claim, such additional claims, to the extent separately identified and argued below, do not stand or fall together.

Argument

With regard to Issues 1-3, appellant respectfully suggests that his drawings and specification show and describe the features of his claims. With regard to Issues 4-7, appellant is of the view that his invention and claims are being misconstrued, particularly with regard to the meaning of “fluid diverter member” and “flow channel.” Appellant is of the view that if these terms are construed consistently with appellant’s specification and given weight in the patentability determinations, then the art cited by the Examiner clearly neither anticipates nor renders obvious the claimed invention. With regard to Issue 4, appellant suggests that the issues raised in Issues 1-3 are appropriate for appeal because they relate to substantive rejection of appellant’s claims, and because appellant has twice petitioned the Commissioner on the same or very similar issues concerning appellant’s drawings without obtaining resolution.

Issue 1 – Whether the drawings show a flow channel 12 extending along an outer surface of the fluid diverter member 4

The drawings are objected to as not showing a flow channel 12 extending along an outer surface of the fluid diverter member 4 as stated in claims 3 and 8.

Figures 1C, 2B and 3B show the flow channel 12 extending along an outer surface of the fluid diverter member 4. The following excerpt from pages 9-10 of appellant's application fully explains the features in question:

To enhance the flow of liquid from the container, a flow channel or groove 12 is preferably formed in the middle of the internal wedge, thus providing the liquid with a specific flow channel. The flow channel 12 is positioned and configured to assist the fluid diverter member 4 in compelling fluid through the sipping region 16A. As shown most clearly in Figure 1C, the flow channel 12 preferably extends lengthwise along an outer surface of the fluid diverter member 4. The channel is preferably continuous from the bottom 6 of the container 2 to the extension spout 8, in order to help prevent spillage as the container is emptied. In the preferred embodiment shown in Figure 1C, the flow channel comprises a lengthwise groove formed by a pair of curved walls 13A, 13B.

(Original specification page 9, line 14 to page 10, line 5).

The examiner has taken the position that the drawing objection can be resolved by changing the word “outer” in line 2 of claim 3 to “inner” or “upper” and by changing the word “outer” in line 12 of claim 8 to “inner” or “upper.” (Page 3) Appellant has declined to make the change. As explained in further detail with regard to Issue 2, there is a very good reason why appellant has chosen to call the area in question an “outer” surface, rather than an “inner” or “upper” surface.

The examiner's proposed change in claim terminology is immaterial to whether the drawings show the claimed subject matter. Appellant respectfully suggest that when the Board

reviews the drawings with reference to the foregoing section of the specification, the Board will agree that the drawings show a flow channel 12 extending along an outer surface of the fluid diverter member 4.

Issue 2 – Whether Claims 3 and 8-10 contain structure that is not shown in the drawings

Claims 3 and 8-10 are objected to as reciting structure pertaining to the flow channel 12 extending along an outer surface of the fluid diverter member 4, which the Examiner states has not been shown in the drawings.

As with the objection to the drawings, the examiner has taken the position that the objection to claims 3 and 8-10 can be resolved by changing the word “outer” in line 2 of claim 3 to “inner” or “upper” and by changing the word “outer” in line 12 of claim 8 to “inner” or “upper.” Appellant has declined to make the change because the Examiner’s proposed amendment is unnecessary, does not add clarity, and would do little except give rise to potential issues under the *Festo* decisions.

Appellant is free to be his own “lexicographer.” There is a reason why appellant has used the word “outer,” as can be seen from the following excerpt from Page 9 of appellant’s specification:

As shown in Figure 1A, the vessel 2 includes a fluid diverter member 4 disposed generally along one side of the container 2. The fluid diverter member 4 is contiguous with an inner surface and the bottom 6 of the vessel 2, such that fluid cannot seep behind the fluid diverter member 4. The diverter member 4 slopes downward substantially from the sipping region 16A of the rim toward an opposing side of the vessel such that when the bottom 6 of the vessel 2 is pivoted upward about the sipping region 16A of the rim 16, the diverter member 4 compels fluid through the sipping region 16A, and into the mouth of a user. As shown in the side view of Figure 1A, the fluid diverter member 4 is preferably wedge shaped. Because of the fluid diverter member 4, the cup or container 2 will

empty with a minimal tilting angle. This internal wedge 4 forces all liquid in the container against the opposing wall of the container 2. The wedge member 4 can also be provided in the form of a preformed insert that is sized to fit into an existing drinking container, such as a conventional coffee cup or mug.

(Original specification, page 8, line 8 to page 9, line 2). This paragraph describes the fluid diverter members 4 as a generally wedge shaped member that is disposed inside of a drinking vessel such as a cup. Obviously, by the way the fluid diverter member 4 is described above (including the way that the fluid diverter member 4 is described with reference to the drawings), the fluid diverter member 4 has only one surface that is exposed; this exposed surface is the “outer” surface. The outer surface is exposed inside of the cup and serves, when the cup is pivoted upward about the sipping region, to compel liquid in the cup through the sipping region and into the mouth of a user. All of this is made clear by the foregoing excerpt from appellant’s specification. However, if there is any doubt as to the location of the “outer” surface, it is laid to rest by the following paragraph from appellant’s specification, which clearly and unambiguously explains how a flow channel 12 positioned on the outer surface of the fluid diverter member 4 can enhance the function of the fluid diverter member 4:

To enhance the flow of liquid from the container, a flow channel or groove 12 is preferably formed in the middle of the internal wedge, thus providing the liquid with a specific flow channel. The flow channel 12 is positioned and configured to assist the fluid diverter member 4 in compelling fluid through the sipping region 16A. As shown most clearly in Figure 1C, the flow channel 12 preferably extends lengthwise along an outer surface of the fluid diverter member 4. The channel is preferably continuous from the bottom 6 of the container 2 to the extension spout 8, in order to help prevent spillage as the container is emptied. In the preferred embodiment shown in Figure 1C, the flow channel comprises a lengthwise groove formed by a pair of curved walls 13A, 13B.

(Original specification, page 9, line 14 to page 10, line 5). As can be clearly seen from the foregoing description and accompanying drawings, the fluid diverter member 4 has one exposed surface or side, namely the “outer” surface. In a preferred embodiment, a flow channel or groove 12 is formed on this outer surface. A person of skill in the art, upon reading the specification and looking at the drawings, will understand that the claimed features are shown in the drawings.

Only by ignoring the specification and drawings can it be said that structure pertaining to the flow channel 12 extending along an outer surface of the fluid diverter member 4 is not shown in the drawings. For the foregoing reasons, the claimed feature of a flow channel 12 extending along an outer surface of a fluid diverter member 4 is clearly and unambiguously shown in the drawings.

Issue 3 – Whether Claims 3 and 8-10 contain subject matter that is not described in the specification

Claims 3 and 8-10 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains to make or use the invention. In particular, the examiner takes the position that the only flow channels designated in the specification by reference number 12 are substantially inner upper surfaces. As with the foregoing claim and drawing objections, the examiner takes the position that the claim rejection under § 112 can be resolved by changing the word “outer” in line 2 of claim 3 to “inner” or “upper” and by changing the word “outer” in line 12 of claim 8 to “inner” or “upper.” For the reasons set forth below, appellant has declined to make the amendment.

The Examiner bears the burden of showing that the proposed claim language is indefinite to one of skill in the art. The Examiner has not met this burden, and has not even attempted to do so, other than to suggest that appellant change the word “outer” to “inner” or “upper” in the rejected claims. However, changing the word “outer” to “inner” or “upper” is not going to make claims 3 and 8-10 any more clear than they already are. The law is clear that if the claims, read in light of the specification, reasonably apprise those skilled in the art of the use and scope of the invention, and if the language is as precise as the subject matter permits, the claims are definite under § 112, ¶ 2. *Shatterproof Glass Corp. v. Libbey-Owens Ford Co.*, 758 F.2d 613, 624, 225 USPQ 634, 641 (Fed. Cir. 1985). For the reasons discussed above, there is no question that a person of skill in the art, upon reading appellant’s claims in view of the specification, will understand exactly what appellant is claiming.

Issue 4 – Whether Issues 1, 2 and 3 relate to petitionable or appealable subject matter

In a January 5, 2004 Notice of Non-compliance with 37 CFR 1.192(c), the Examiner took the position that Issues 1-3 of this brief pertain to petitionable matters rather than appealable matters. In a February 24, 2004 Decision On Petition, the Commissioner allowed appellant to proceed forward with appeal on Issue 1, 2 and 3, but did not specifically determine whether the issues were petitionable or appealable. Because Issues 1-3 involve substantive grounds on which claims have been rejected, it appears that these issues should be reviewed by the Board. Additionally, appellant would like to make clear that he has twice petitioned the Commissioner to address identical or very similar issues concerning the drawings that are raised in Issues 1-3 of this brief, but without obtaining resolution. (See Papers 20 and 41).

Issues 1-3 are closely intertwined because in these three issues, the Examiner essentially uses appellant's drawings as the basis for rejecting claims 3 and 8-10 under 35 U.S.C. 112, First Paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains to make or use the invention. On multiple occasions, appellant has stated his position that the drawings, as well as the written specification, clearly show and describe the claimed features. Because Issues 1-3 involve substantive grounds on which claims have been rejected, it appears that these issues should be reviewed by the Board.

Additionally, appellant has twice filed petitions concerning the drawings, but without obtaining a clear resolution. In his first petition (Paper 20), appellant asked the Commissioner to address the following issues:

“Petition to Require Reinstatement of Claims 2, 3, 6 and 8-10 Based on the Sufficiency of the Drawings.” (See Paper 20, pp. 6-8).

“Petition to Withdraw New Matter Rejections Related to Appellant's Drawings and Require Entry of Applicant's Formal Drawings.” (See Paper 20, pp. 8-10).

For each of these petition issues, appellant thoroughly explained why the drawings show what is described and claimed in the specification. (See Paper 20, pp.6-10).

When the Commissioner issued a decision on appellant's first petition, appellant was of the view that the decision resolved any issues concerning the drawings. The Commissioner concluded that appellant's drawings were acceptable and were to be entered. (See Paper 21). In the Decision, the Commissioner stated:

In fact, it is clear that all of the claims in fact read on Figures 4A and 4B, since the container illustrated therein is in fact 'the container' described with

respect to the various Figure 2 drawings, and would therefore include the features shown therein and described in the written specification.”

(Paper 21, p. 2). The Commissioner further held:

As to the drawings, a review of the original disclosure and of the formal drawings appended to the petition is convincing that the formal drawings do not¹ illustrate subject matter which was reasonably conveyed as having been in the possession of the petitioner on the day that this application was filed. Therefore, the examiner’s holding to the contrary is deemed to be clearly erroneous, and the formal drawings attached to the petition will be entered, subject to satisfaction of the formal drawing standards of 37 CFR 1.84.

(Paper 21, p. 2).

In appellant’s second petition (Paper 41), appellant specifically asked the Commissioner to address whether Issues 1-3 of appellants brief are petitionable rather than appealable, stating: “If the Commissioner believes that the foregoing issues [Issues 1-3] are appropriate for petition, applicant respectfully requests that the Commissioner consider and resolve the issues, including consideration of the question of whether the issues were already disposed of in the Commissioner’s decision in Paper No. [21].” (See Paper No. 41, p. 3). In its second Decision, the Commissioner concluded that it did not resolve Issues 1, 2 and 3 in its Decision in Paper 21, but did not address appellant’s request that the Commissioner consider and resolve the issues. (See Paper 42).

In conclusion, appellant respectfully submits that Issues 1-3 involve substantive grounds of rejection that are appropriate for appeal. Appellant further respectfully notes that he has twice

¹ Although the Decision uses the words “do not,” it seems clear from the context that the Commissioner intended to say that the drawings do illustrate subject matter reasonably conveyed as having been in the possession of the petitioner on the day that the application was filed. Otherwise, the Commissioner would not have concluded, in the very next sentence, that “the examiner’s holding to the contrary is deemed to be clearly erroneous, and the formal drawings attached to the petition will be entered . . .” (Paper 21, p. 2).

attempted to resolve issues concerning the sufficiency of the drawings by petition, but without obtaining a resolution.

Issue 5 – Whether Claims 1-10 are anticipated by Neville and Dixon

Claims 1-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Neville and Dixon, Sr. et al. (“Dixon”).

Anticipation under 35 USC 102(b) requires the presence in a single prior art reference disclosure of each and every element of the claimed invention, arranged as in the claim. *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 58 USPQ.2d 1286, 1291 (Fed.Cir.2001); MPEP § 2131. To establish a prima facie case of anticipation under 35 USC 102(b), the Examiner must identify the elements of the claims of the application, determine their meaning in light of the specification and prosecution history, and identify the corresponding elements disclosed in the allegedly anticipating references. *Lindermann Maschinenfabrick GMBH v. American Hoist and Derrick Co.*, 221 USPQ 481, 485 (Fed. Cir. 1984). If the Examiner does not produce a prima facie case of anticipation, then the appellant is entitled to the grant of a patent. *In re Oetiker*, 24 USPQ.2d 1443 (Fed. Cir. 1992).

Neither Neville nor Dixon disclose each and every element of the claimed invention. Among other things, Neville and Dixon completely fail to disclose the claimed fluid diverter member 4. Neville and Dixon each disclose only an ordinary drinking vessel having inwardly sloping walls. Only by ignoring appellant’s specification (see e.g. page 8, line 8 to page 9, line 2) and drawings (Figures 1A, 1C, 2B, 3A, 3B, 4A), while simultaneously reading the teachings from appellant’s specification and drawings into the cited references, can the inwardly slopping

walls of Neville and Dixon somehow be construed as disclosing the claimed “fluid diverter member.”

A §102(b) reference must place the needed subject matter supporting the anticipation rejection in the public domain. *In re Zenitz*, 333 F.2d 924, 142 USPA 158, 160 (CCPA 1964). The §102(b) reference must be such that a person of ordinary skill in the field of the invention would consider there to be no difference between the claimed invention and the reference disclosure. *Scripps Clinic & Research Foundation v. Genentech, Inc.*, 927 F.2d 1565, 18 USPQ.2d 1001, 1010 (Fed. Cir. 1991). In other words, the §102(b) reference must put the claimed invention in the hand of one skilled in the art. *In re Spada*, 911 F.2d 705, 708, 15 UAPQ.2d 1655, 1657 (Fed. Cir. 1990; *In re Donohue*, 766 F.2d 531, 533, 226 USPQ 619, 621 (Fed. Cir. 1985). The description from the §102(b) reference must enable a person with ordinary skill in the art not only to comprehend the invention but also to make it. *Paperless Accounting, Inc. v. Bay Area Rapid Transit System*, 804 F.2d 659, 665 (Fed. Cir. 1986), cert. den. 480 U.S. 933 (1987).

The Neville and Dixon references do not place the claimed invention in the hands of a person of ordinary skill in the art. The Neville and Dixon references make absolutely no reference to a drinking vessel having a structure therein for compelling fluid through a drinking area. All the references show is a drinking vessel having walls that uniformly slope inward. In Figures 1A, 1C, 2B, 3A, 3B, and 4A and pages 8-10 of his application, appellant describes in great detail a fluid diverter member 4 that differs markedly from a drinking container having inwardly sloping walls. The fact that appellant has included broad claims to a fluid diverter

member should not prevent him from obtaining issuance of such claims, particularly when a fluid diverter member is not even found in the prior art. Appellant is entitled to have his claims interpreted in light of the description set forth in appellant's specification and drawings, not in a vacuum based on improper hindsight reconstruction of the invention.

Claims 1-5 and 7 are each separately patentable from Claims 8-10 over Dixon because claims 8-10 include an extension spout extending upward and outward from an upper rim, an upper portion of the extension spout forming a sipping region. Claim 2 is separately patentable from Claim 1 because Claim 2 includes a fluid diverter member that is wedge shaped. Neither of the cited references show this feature. Claim 3 is separately patentable from Claim 1 because Claim 3 includes a flow channel extending lengthwise along an outer surface of the fluid diverter member. Neither of the cited references show this feature. Claim 6 is separately patentable from Claim 1 over Dixon because Claim 6 includes a sipping region comprising an extension spout extending upward and outward from the upper rim. Claim 7 is separately patentable from Claim 1 over Neville because Claim 7 includes a lid configured to removably seal the upper rim, the lid having an extension spout configured to extend the fluid diverter member upward and outward to thereby assist the fluid diverter member in compelling fluid through the sipping region.

Because neither Neville nor Dixon discloses each and every element of the claimed invention, it is respectfully submitted that a prima facie case of anticipation by Neville or Dixon has not been established.

Issue 6 – Whether Claims 1-6 and 8-10 are anticipated by Watson

Claims 1-6 and 8-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Watson. Appellant respectfully submits that Watson does not anticipate claims 1-6 and 8-10. Watson differs markedly from the present invention because it does not disclose several features of the claimed invention. Because Watson does not disclose each and every element of the claimed invention, arranged as in the claims, it is respectfully submitted that the Examiner has not established a prima facie case of anticipation under 35 USC 102(b).

Independent claims 1 and 8 recite a “fluid diverter member contiguous with an inner surface and said bottom of said vessel, said diverter member sloping downward...from said sipping region...toward an opposing side of said vessel such that when said bottom of said vessel is pivoted upward about said sipping region...said diverter member compels fluid through said sipping region.” Claims 2, 4 and 6, which are dependent on claim 1, and claim 9, which is dependent on claim 8, also include the fluid diverter member recited in their corresponding independent claims. None of these claimed features are shown in the Watson reference.

The Examiner has not identified any of the elements of the claims of the application, including particularly the fluid diverter member, or the corresponding elements disclosed in the cited anticipating reference. Accordingly, the absence of a fluid diverter member in Watson is sufficient to overcome the grounds for the 102(b) rejection.

Moreover, Watson relates to a drinking vessel comprising a spout that projects laterally from one side of the vessel near its open upper end. Both Watson’s disclosure and claims expressly recite a vessel comprising “a main body of generally hollow form having a closed

bottom end, a generally uninterrupted peripheral side wall formed about a generally centered vertical axis, and terminating in an upper end.” This description of the main body of Watson’s vessel necessarily prohibits the inclusion of a fluid diverter member sloping downward from the sipping region toward an opposing side of the vessel.

Claim 2 is separately patentable from Claim 1 because Claim 2 includes a fluid diverter member that is wedge shaped. The Watson reference does not show this feature. Claim 3 is separately patentable from Claim 1 because Claim 3 includes a flow channel extending lengthwise along an outer surface of the fluid diverter member. The Watson reference does not show this feature.

For these reasons, the appellant submits that a prima facie case of anticipation has not been established as to claims 1-6 and 8-10 and it is respectfully suggested that the claims are allowable over the art of record.

Issue 7 – Whether Claims 4, 5, 9 and 10 are obvious over Neville/Dixon in View of Rosen

Claims 4, 5, 9 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Neville or Dixon in view of Rosen.

The Examiner bears the initial burden of factually supporting a prima facie conclusion of obviousness. MPEP § 2142. If the Examiner does not produce a prima facie case, the appellant is under no obligation to submit evidence of nonobviousness. *Id.* To establish a prima facie case of obviousness, the examiner must demonstrate: (1) some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art,

to combine reference teachings; (2) a reasonable expectation of success; and (3) that the references teach or suggest all of the claim limitations. *Id.*

To establish prima facie obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. MPEP § 2143.03, citing *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). Appellant suggests that the Examiner has not made a prima facie case as to claims 4, 5, 9 and 10 because neither Neville nor Dixon in combination with Rosen teaches or suggests all the claim limitations, including without limitation a fluid diverter member.

The lack of a fluid diverter member in Neville and Dixon was discussed *supra*. Rosen relates to a leak resistant drink box holder, which by necessity includes a straw to evacuate the contents of the drink box. A fluid diverter member as claimed in the application would serve no purpose in the invention disclosed in Rosen for two reasons. First, Rosen's drink box holder does not hold fluid, but instead holds a solid drink box; therefore, there is no fluid in the vessel that requires diverting. Second, since a straw is required to evacuate the contents of the drink box, pivoting the drink box holder would not result in the fluid diverter member compelling liquid through the sipping region, but instead would result in the failure of the straw to maintain a liquid seal and the inability to evacuate the drink box.

Based on the foregoing, the cited references not only fail to teach or suggest all of the claim limitations, namely the fluid diverter member, but also teach away from the inclusion of such a limitation in their respective inventions. Therefore, appellant submits that no prima facie

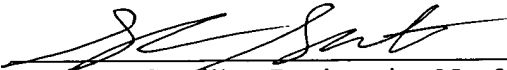
case of obviousness has been established as to claims 4, 5, 9 and 10, and it is respectfully suggested that the claims are allowable over the art of record.

Conclusion

For the reasons advanced above, Appellant respectfully contends that each claim is patentable. Therefore, reversal of all rejections is courteously solicited.

To the extend necessary, a petition for an extension of time under 37 C.F.R. 1.136 is hereby made. Please charge any shortage in fees due in connection with the filing of this paper, including extension of time fees, to Deposit Account 502346 and please credit any excess fees to such deposit account.

Respectfully submitted,


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Date: March 3, 2004

Appendix

1. A drinking container for assisting a disabled person in drinking a fluid by reducing the degree of tilt necessary to drain the fluid from the container into the person's mouth comprising:

a fluid holding vessel having an upper rim and a closed bottom, said upper rim having an opening through at least a sipping region thereof,

a fluid diverter member contiguous with an inner surface and said bottom of said vessel, said diverter member sloping downward substantially from said sipping region of said rim toward an opposing side of said vessel such that when said bottom of said vessel is pivoted upward about said sipping region of said rim, said diverter member compels fluid through said sipping region.

2. The drinking container of claim 1, wherein said fluid diverter member is wedge shaped.

3. The drinking container of claim 1, further comprising a flow channel extending lengthwise along an outer surface of said fluid diverter member, said flow channel positioned and configured to assist said fluid diverter member in compelling fluid through said sipping region.

4. The drinking container of claim 1, further comprising a handle on an outer surface of said vessel, said handle positioned at about ninety degrees relative to said sipping region.

5. The drinking container of claim 1, further comprising a pair of handles on an outer surface of said vessel, one of said handles positioned at about 90 degrees relative to said

sipping region, and the other of said handles positioned at about 270 degrees relative to said sipping region.

6. The drinking container of claim 1, wherein said sipping region comprises an extension spout extending upward and outward from said upper rim, said extension spout contiguous with said fluid diverter member to thereby assist said fluid diverter member in compelling fluid through said sipping region.

7. The drinking container of claim 1, further comprising a lid configured to removably seal said upper rim, said lid having an extension spout configured to extend said fluid diverter member upward and outward to thereby assist said fluid diverter member in compelling fluid through said sipping region.

8. A drinking container for assisting a disabled person in drinking a fluid by reducing the degree of tilt necessary to drain the fluid from the container into the person's mouth comprising:

a fluid holding vessel having an open upper rim and a closed bottom,

an extension spout extending upward and outward from said upper rim, an upper portion of said extension spout forming a sipping region,

a wedge-shaped fluid diverter member contiguous with an inner surface and said bottom of said vessel, said fluid diverter member sloping downward from said sipping region of said extension spout toward an opposing side of said vessel such that when said bottom of said vessel is pivoted upward about said sipping region, said diverter member compels fluid through said sipping region, and

a flow channel extending lengthwise along said outer surface of said fluid diverter member, said flow channel positioned and configured to assist said fluid diverter member in compelling fluid through said sipping region.

9. The drinking container of claim 8, further comprising a handle on an outer surface of said vessel, said handle positioned at about ninety degrees relative to said sipping region.

10. The drinking container of claim 8, further comprising a pair of handles on an outer surface of said vessel, one of said handles positioned at about 90 degrees relative to said sipping region, and the other of said handles positioned at about 270 degrees relative to said sipping region.